BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEPH R. PLEASANT Claimant	)	
VS.	)	
MORENO FAMILY DENTISTRY Respondent	)	Docket No. **1,058,353**
AND	)	
NORTHERN INS. CO. OF NEW YORK Insurance Carrier	)	

ORDER

Claimant requests review of the February 2, 2012 Preliminary Decision entered by Administrative Law Judge Marcia L. Yates.

ISSUES

Claimant was walking to his office from his designated parking space provided by respondent when he slipped on ice in the parking lot and fell dislocating as well as fracturing his ankle. Respondent argued the parking lot was not part of respondent's premises and compensation was excluded by the "going and coming" rule of K.S.A. 44-508(f). Claimant argued that the parking lot constituted respondent's premises, consequently the "premises" exception to K.S.A. 44-508(f) applied and the claim was compensable. The Administrative Law Judge (ALJ) found claimant was not on respondent's premises when he fell and compensation was excluded under the "going and coming" rule of K.S.A. 44-508(f).

Claimant requests review of whether his accidental injury arose out of and in the course of employment. Claimant contends that providing free parking and designating his specific parking space provides sufficient control by the respondent to establish the parking lot is part of the respondent's premises. Accordingly, claimant further argues the "premises" exception to the "going and coming" rule is applicable and the claim compensable. Respondent argues the claimant was not on respondent's premises when he fell and instead was in an open area of the parking lot neither leased, controlled, nor

owned by respondent. Consequently, respondent further argues compensation is excluded by K.S.A. 44-508(f) as the accident occurred while claimant was on his way to work.

The sole issue to be determined in this appeal is whether claimant's accident is compensable under the Kansas Workers Compensation Act or excluded by the provisions of K.S.A. 44-508(f).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

The facts are essentially undisputed. The respondent rents office space in the Brotherhood Bank Building in Kansas City, Kansas, from the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. Respondent leased parking spaces in a parking lot across the street west of the Brotherhood Bank Building also owned by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. Respondent does not maintain the parking lot. Respondent's employees were provided, as a benefit, specific designated parking spaces within the parking lot.

Respondent's office manager, Jolene Bivens, assigns the parking spaces to respondent's employees which are in a designated area. Claimant was assigned to parking spot #57 to use on a daily basis. On January 31, 2011, claimant had parked his car and was walking from his car to the office when he slipped on ice and fell in the parking lot entrance. Claimant testified that he took the most direct route from his car to the Brotherhood Bank Building and most of respondent's employees take this same route to and from the parking lot to the Brotherhood Bank Building.

Ms. Bivens testified that other tenants in the Brotherhood Bank Building including several law offices, two or more dental offices and the bank all have employees that also park in this same parking lot. And respondent also has two parking spaces for its patients who must check in with the guard in front of the lot.

Claimant's medical bills and temporary total disability compensation have been paid by respondent's insurance carrier pending investigation of the claim.

The "going and coming" rule contained in K.S.A. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume

> the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[1] In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[2]

But K.S.A. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[3] The "premises" rule creates an exception to the "going and coming" rule where the employee is on the employer's premises even if the employee is on his or her way to or from work. The dispute in this case centers on whether the parking lot can be construed as respondent's "premises."

The Kansas Supreme Court has addressed the "going and coming" rule and the "premises" exception in two fairly recent cases. In *Rinke*,[4] the claimant was injured while walking in a parking lot adjacent to the Bank of America, her employer's building. The parking lot in *Rinke* had 757 parking spaces, of which 737 were "reserved spaces" for Bank employees only. The remaining 20 spaces were reserved for employees of Wesley Occupational Services, the other tenant in the bank building. According to the lease agreement rider, the reserved spaces represented by the "reserved parking permits" would at all times be located within an area of the lot designated for use solely by the Bank. There was no walk-in traffic as the only activity in the building, other than the Bank and Wesley, was an ATM on the first floor. The Bank also had the right to install and maintain a drive-up ATM facility, at the bank's expense in an area along the lot's eastern edge.

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[1] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[2] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[3] Id. at Syl. ¶ 1.

[4] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

The claimant, in *Rinke*, was injured as she approached her car after exiting the building using the only door authorized for anyone to exit and enter the building. In construing the "premises" exception, the Court in *Rinke* noted that precedent required the employer to exercise "control" of an area in order for the place to be part of the employer's premises. The Court determined that Rinke was injured on the Bank's premises because: (1) the parking lot was adjacent to the building where she worked; (2) the Bank leased a substantial portion of the building and the parking lot; (3) the Bank was allocated a certain portion of the lot; (4) the Bank specifically requested her to park in the allocated spaces; and (5) she was injured in that designated area of the lot leased by the Bank.

Some years earlier the Kansas Supreme Court also considered the "going and coming" rule and the "premises" exception in *Thompson.*[5] In *Thompson*, the claimant was furnished parking in a public parking garage across a public street from the office building in which she worked. On the date of accident, the claimant went to the fourth floor of the garage, crossed the public street in an overhead walkway and took the elevator to the eighth floor of the building. As she exited the elevator, she fell, injuring herself. Neither the elevator, the parking garage, nor the building in which the claimant worked were owned, controlled or maintained by her employer, although the firm did pay for the claimant's parking as part of her employment contract. The Kansas Court of Appeals, in *Thompson*, construed the Kansas cases to,

> . . . indicate that Kansas narrowly construes the term "premises" to be a place controlled by the employer or a place where an employee may reasonably be during the time he or she is doing what a person so employed may reasonably do during or while the employment is in progress.[6]

The Kansas Supreme Court found the Kansas Court of Appeals' construction of the term "premises" in the *Thompson* case to be accurate.

Kansas case law requires control by an employer in order for an area to be part of the employer's premises for purposes of the "premises" exception to the "going and coming" rule.[7] The Court in *Thompson* discussed the "proximity" or "zone of employment" rule but refused to adopt such a rule for Kansas.

What can be gleaned from these two cases is that while the courts were initially reluctant to expand the concept of an employer's premises beyond the physical walls of the office specifically leased and rented for the employer's business purposes, more

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[5] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[6] *Id.* at 39, citing *Thompson v. Law Offices of Alan Joseph*, 19 Kan. App. 2d 367, 373-374, 869 P.2d 761 (1994).

[7] *Id.* at 40.

recently they have been willing to expand the concept of "premises" beyond those physical walls to encompass exterior areas, such as parking lots, when those areas are used primarily by the employer's employees and particularly when the building and the parking lot or structure is owned by the same entity.

Both *Rinke* and *Thompson* discuss in detail the joint ownership of the respondent's building and the parking lot by the same entity. Both consider cases from other jurisdictions where joint ownership of the building and the parking lot leased to and used by the respondent is considered significant in determining "premises." The Court in *Thompson* found no evidence that the owner of the building where the employer rented office space also owned the public parking garage where the claimant parked her car. The Court in *Rinke*, after discussing this finding, went on to hold "[i]n our view, this distinction includes a significant difference."[8] The Court went on to hold that the cases which involved joint ownership of both respondent's building and the parking lot involved "a much more substantial landlord and employer tenant relationship covering employee parking existed than in *Thompson.*"[9]

In this case respondent rented office space and parking space from the same owner. As previously noted, in *Rinke* the Court listed factors which indicated the claimant was injured on the Bank's premises. In the instant case the majority of those factors are present, (1) the parking lot where claimant fell was adjacent to the Brotherhood Bank Building; (2) the respondent leased office space in the building and paid for a designated area for parking; (3) respondent allocated a certain portion of the lot for its employees; (4) respondent further designated specific parking spaces for each employee; and, (5) claimant was injured in the parking lot as he took the direct route from the lot to the office building. And while employees of other tenants from the Brotherhood Bank Building parked in the same parking lot, that alone is not persuasive on the issue of whether this parking lot constituted respondent's "premises" for purposes of workers compensation. In summary, respondent leased office space and parking space from the same lessor. Respondent provided free parking to claimant as a benefit and designated not only the area for claimant to park but also the specific numbered parking space. These factors all combine to establish sufficient respondent control to determine the parking lot constituted respondent's premises under the facts of this case. This Board Member concludes that claimant sustained an injury on respondent's "premises." Claimant's accidental injury is not precluded by the "going and coming" exception contained within K.S.A. 44-508(f).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this

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[8] *Rinke*, 282 Kan. 746 at 757.

[9] *Id.*

[10] K.S.A. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

WHEREFORE, it is the finding of this Board Member that the Preliminary Hearing Decision of Administrative Law Judge Marcia Yates dated February 2, 2012, is reversed.

IT IS SO ORDERED.

Dated this 6th day of April, 2012.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Michael Stipetich, Attorney for Claimant
Julie A.N. Sample, Attorney for Respondent and its Insurance Carrier
Marcia Yates, Administrative Law Judge

[11] K.S.A. 2010 Supp. 44-555c(k).